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SUPREME COURT, U.S.
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No. 04-929

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION AND THE ARAPHO INDIAN TRIBE OF THE WIND RIVER RESERVATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Federal Circuit fundamentally erred in holding that the relevant appropriations Acts revive claims that were time-barred before the first of the Acts was passed, even though nothing in the Acts so provides. Pet. 12-19. This Court has recognized that the revival of such moribund claims raises substantial retroactivity concerns, and other courts of appeals, unlike the Federal Circuit in this case, have accordingly insisted upon a clear statement or affirmative expression of intent by Congress before a statute will be construed to have that effect. Pet. 13-14, 17. The Tribes make no effort to reconcile the decision below with those precedents.

The court of appeals further erred by abrogating the statute of limitations not only for claims based on the government's alleged violation of statutes governing its handling of "trust funds" held in the Treasury—the subject of the appropriations Acts—but also to distinct claims based on the alleged violation of duties under *other* statutes to collect revenues from leases or other transactions involving land and natural resources. Pet. 20-23. The court of appeals then

compounded that error by holding that the Tribes are entitled to interest on those claims from the day of the violation, even though there is no Act of Congress providing for the payment of prejudgment interest on such claims, as required by 28 U.S.C. 2516 and this Court's cases.

Those seriously flawed rulings by the Federal Circuit will substantially increase the volume and complexity of Indian trust litigation, as well as the potential monetary exposure of the United States in suits alleging breach of the government's trust obligations. Those disruptive effects are particularly great when the court of appeals' holdings are considered together, since the availability of prejudgment interest under that decision creates a particular incentive for plaintiffs to pursue claims that accrued (and expired) in the distant past.

The Tribes make no meaningful effort to dispute the practical significance of the court of appeals' decision, nor do they contend that the case is insufficiently important to warrant this Court's review. Indeed, the Tribes themselves have filed a certiorari petition (No. 04-731) seeking review of the Federal Circuit's interpretation of the appropriations Acts as applied to claims concerning land and natural resources. Significantly, moreover, the Tribes appear to acknowledge (Br. in Opp. 6 n.6) that, under the court of appeals' decision, the effect of the appropriations Acts will often be to revive moribund claims. Their only response is that the government "can trigger commencement of the limitations period at any time by furnishing an accounting to the affected tribes or individuals." *Ibid.* That observation entirely misses the point. No matter how quickly the government completes the accountings, plaintiffs will be entitled under the Federal Circuit's decision to seek redress for alleged breaches of trust that occurred decades in the past—no matter how clearly a plaintiff was on notice of the alleged breach at an earlier time.

A. The Court Of Appeals' Expansive Construction Of The Appropriations Acts Warrants Review By This Court

1. Our certiorari petition explains (at 15-16) that the appropriations Act provisions, read as a whole, are best construed as preventing expiration of the applicable limitations period on any causes of action covered by the Acts that remained live when the first of the Acts was passed. The limitations period will then run on such a claim after an accounting is completed. The Tribes contend, however, that the appropriations Acts should be construed to have the far more sweeping effect of reviving time-barred claims as well. That contention is without merit.

The Tribes fail even to mention the decisions of this Court, cited in our petition (at 13, 17), that recognize the substantial retroactivity concerns raised by the revival of time-barred claims. See *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) ("[E]xtending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action."); cf. *Stogner* v. *California*, 539 U.S. 607 (2003). They likewise fail even to mention the decisions of other courts of appeals, likewise discussed in our petition (at 13), holding that an Act of Congress will not be construed to revive time-barred claims, at least in the absence of a clear statement or affirmative manifestation of intent by Congress. See, *e.g.*, *Resolution Trust Corp.* v. *Seale*, 13 F.3d 850, 853 (5th Cir. 1994) ("clear expression" required). Indeed, invoking the presumption against retroactivity, this Court itself has adopted such a rule of construction in declining to interpret a new statute of limitations to revive time-barred claims. See *Fullerton-Krueger Lumber Co.* v. *Northern Pac. Ry.*, 266 U.S. 435, 437 (1925). The requirement of a clear statement is reinforced in this case by the firmly established rule that a statute of limitations is a condition on the waiver of the United States' sovereign immunity from suit and therefore

must be strictly construed in favor of the United States. See Pet. 14.

Insistence upon a clear statement before giving such retroactive effect to a statute assures that Congress itself has affirmatively considered the potential unfairness or other adverse effects of retroactive application and has "determined that it is an acceptable price to pay for the countervailing benefits." *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001). The appropriations Acts at issue in this case, however, do not contain any clear statement in their text reviving moribund claims, and there is nothing in those Acts or their background demonstrating that Congress affirmatively considered the question and decided to take that extraordinary step. Indeed, far from manifesting any intent (much less the requisite clear intent) to revive moribund claims, the phrase "shall not commence to run" is most naturally read to apply only prospectively, to claims that had not yet accrued (and for which the limitations period therefore had not yet "commenced") when the first of the Acts was passed. The phrase has no natural—and certainly no unambiguous—application to claims as to which the applicable limitations period had not only "commence[d] to run" but had long since expired. Nor is the Tribes' interpretation supported by Congress's far more modest purpose in enacting the appropriations Act provisions: to maintain the status quo by ensuring that the claims of Tribes and individual Indians do not expire during the pendency of the accounting process. See Pet. 23 n.12.

There is no basis for the Tribes' contention (Br. in Opp. 5) that the appropriations Acts are necessarily retroactive and therefore revive time-barred claims because the versions of the Acts beginning in 1993 expressly provide that the deferral of the limitations period applies to "any claim in litigation pending on the date of the enactment of this Act." That phrase merely serves to eliminate any doubt that a plaintiff who had already filed a timely suit would be able to

take full advantage of the tolling provision—*e.g.*, by dismissing its suit and then refiling after an accounting has been completed. In addition, as a result of that express inclusion of "pending cases," there is now also a reasonable basis for declining to give the phrase "shall not commence to run" what would otherwise be its most natural reading—as limiting the tolling provision to claims that had not yet accrued when the first of those Acts was passed (see p. 4, *supra*)—and for instead construing the appropriations Acts to defer the running of the statute of limitations even for claims that *had* already accrued (but were not time-barred) when the first of those acts was passed. See Pet. 16-17 n.7. Contrary to the Tribes' assertion (Br. in Opp. 5), such laws extending the limitations period for live claims do not trigger the presumption against retroactivity and resulting requirement of a clear statement.

By contrast, laws that revive time-barred claims plainly *are* disfavored in that stronger sense, and nothing in the phrase referring to "pending cases" suggests that the appropriations Acts were intended to have that extraordinary consequence. In any event, only a clear statement by Congress would suffice to give the Acts that effect, and there is nothing of the sort here.[1]

2. The certiorari petition explains (at 20-23) that the phrase "losses to * * * trust funds" in the annual appropriations Acts does not stop the running of the limitations period for claims based on the allegedly wrongful failure by the United States to collect money owed under the Tribes' mineral leases. The Tribes contend (Br. in Opp. 7-8) that the government's reading of that phrase fails to accord distinct

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[1] The Tribes' position, moreover, accords the 1993 addition of the reference to "pending cases" no operative significance. For if the Tribes were correct that the appropriations Acts had already categorically eliminated any statute of limitations issue for *all* claims until an accounting is performed, the Acts would *already* have encompassed pending cases, and far more.

meanings to the words "losses" and "mismanagement" as they pertain to Indian trust funds. That is incorrect. The word "losses" describes the effect upon the trust, while the word "mismanagement" focuses upon the government's actions as trustee. Undoubtedly there is substantial overlap between the two terms, in the sense that "mismanagement of" trust funds will often result in "losses to" the funds. The Tribes are incorrect, however, in contending that the government's reading of the appropriations Acts renders the terms synonymous.

As the Tribes acknowledge (Br. in Opp. 9), Congress was surely aware that the government is subject to statutory responsibilities with respect to Indian lands and natural resources that are entirely distinct from its statutory duties to manage funds in Indian trust accounts held in the Treasury. See Pet. 23-24. The existence of those separate statutory schemes strongly reinforces the significance of the statutory language that Congress employed in the appropriations Acts. Congress chose to defer the running of the statute of limitations, not for all claims that allege mismanagement of trust "assets" or "resources," but only for claims "concerning losses to or mismanagement of trust *funds*."[2] Congress's evident intent was to defer the limitations period only for claims that the government had improperly performed its duties as trustee for Indian *monetary* assets. That conclusion is confirmed by the express and limited

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[2] As the Tribes observe (Br. in Opp. 8), the applicable regulatory definition of the term "trust funds" includes "money derived from" lands or natural resources held in trust. 25 C.F.R. 115.002. Section 115.002 defines the term "trust assets" to mean "trust lands, natural resources, *trust funds*, or other assets held by the federal government in trust for Indian tribes and individual Indians" (emphasis added). By referring separately to "natural resources" and "trust funds," that definition makes clear that, while "trust funds" may include money actually derived from the sale or lease of Indian mineral resources, it does not include either the minerals themselves or money that allegedly should have been, but was not, in fact, derived from natural resources.

purpose of the appropriations Acts, which is only to defer the limitations period until there has been "an accounting of *such funds*"—*i.e.*, of the trust funds themselves, not of land and natural resources. Pet. 21-23.[3]

B. The Court Of Appeals' Holding That The Tribes Are Entitled To Prejudgment Interest Also Warrants Review

1. Respondents state (Br. in Opp. 12) that their "damages claim for lost interest is predicated upon the Government's statutory obligation to invest and earn interest on all revenues derived from the Tribes' natural resources." They rely on 25 U.S.C. 612, which provides that "all future revenues and receipts derived from the Wind River Reservation" shall be "credited to the principal trust fund accounts" established for the Tribes, on which "interest shall accrue * * * at the rate of 4 per centum per annum." They also rely (Br. in Opp. 13, 17) on Indian statutes of general applicability that provide for the payment of interest on funds that are "carried on the books" of the Treasury to the credit of Tribes and individual Indians (25 U.S.C. 161a, 161b) or funds that are "withdraw[n] from the United States Treasury" for deposit in banks (25 U.S.C. 162a). All of those

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[3] As the petition for certiorari explains (at 21), the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239, refers only to an accounting of Indian *monetary* assets held in trust by the United States. The Tribes' description (Br. in Opp. 10-11) of the government's duties under the 1994 Act does not call that point into question or suggest that the government is required to account for funds that should have been received from Indian natural resources but were not in fact received. The certiorari petition also explains (at 22 n.11) that the district court in *Cobell* v. *Norton*, No. 96-cv-1285 (D.D.C.), enjoined the government to proceed in compliance with a broader view of the obligations imposed by the 1994 Act to account for trust funds, and that the injunction was subsequently vacated by the court of appeals. On February 23, 2005, after the petition for certiorari in this case was filed, the district court in *Cobell* reinstated the historical accounting portions of the prior injunction. The government has filed a notice of appeal from that order and has sought an emergency stay from the D.C. Circuit.

statutes thus concern funds that have already been received by the government and credited to accounts held for Indians in the Treasury. None provides for the payment of interest on money that has not been so received and deposited.

If the government had received payments on tribal mineral leases and deposited the money into a *non*-interest-bearing account in the Treasury, an award of the interest to which the Tribes were legally entitled would be an appropriate means of redressing the government's breach of its statutory obligations under Section 612 or the other statutes cited above. Such an award would not be "[i]nterest on a claim" within the meaning of 28 U.S.C. 2516(a), because the government's breach of its duty to pay interest on monies it deposited in the Treasury would itself be the claim on which relief was granted.

The Tribes identify no provision of law, however, that requires the government to pay interest on money that was *not* actually received from Indian mineral leases and deposited in the Treasury, whether because of governmental mismanagement or for any other reason. The Tribes instead attempt (Br. in Opp. 13-14) to avoid the firmly established rule under 28 U.S.C. 2516 and this Court's cases barring an award of prejudgment interest (see Pet. 24-25) by characterizing the award of interest in this case as an element of "damages" for the mismanagement of tribal minerals. As the Court explained in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), however, the "character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *Id.* at 321 (quoting *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976)).

The gravamen of the Tribes' contention is that, "[b]y failing to reasonably manage the collection of lease payments, the Government deprived the Tribes of not only trust

principal, but also the interest that would have been generated on that principal had the Government not breached its fiduciary responsibilities." Pet. App. 23a-24a n.7. That rationale is indistinguishable from the asserted justification for *any* award of prejudgment interest—*i.e.*, to provide "complete compensation" by "ensur[ing] that the [plaintiff] is placed in as good a position as he would have been in had" no violation of law occurred. *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 655 (1983); see *West Virginia* v. *United States*, 479 U.S. 305, 310-311 (1987). Statutory and decisional law makes clear, however, that prejudgment interest is nonetheless unavailable in suits against the United States, absent a statute expressly providing for such an award. See Pet. 24-25; *Shaw*, 478 U.S. at 315 ("policy, no matter how compelling, is insufficient, standing alone, to waive immunity to interest").

2. The Tribes' reliance (Br. in Opp. 14-20) on *Peoria Tribe of Indians* v. *United States*, 390 U.S. 468 (1968), is misplaced. The Court in *Peoria Tribe* framed the relevant question as "whether the obligation of the United States to invest" the proceeds of tribal land sales in income-producing stocks "applies to proceeds which, by virtue of the United States' violation of the treaty [*i.e.*, its failure to sell the land at public auction], were never in fact received." *Id.* at 471. Relying in part on canons of construction that are distinctive to Indian treaties, see *id.* at 472-473, the Court construed the pertinent treaty to require the payment of interest, see *id.* at 471-473. As the Federal Circuit's predecessor court, the Court of Claims, explained—in the same *Mescalero Apache Tribe* case this Court quoted with approval in reaffirming the no-interest rule in *Library of Congress* (see p. 8, *supra*)—"*Peoria Tribe* * * * did not change the usual rule that *absent breach of a specific treaty obligation*, no interest, or its equivalent, can be allowed against the United States." 518 F.2d at 1322 (emphasis added). This case, unlike *Peoria Tribe*, involves no treaty obligation.

Moreover, the Tribes have not even identified any *statutory* provision that could plausibly be construed to require the government to pay interest on hypothetical lease proceeds that were never actually deposited in the Treasury. Indeed, in its en banc decision in the seminal *Mitchell II* Indian trust litigation, the Court of Claims held that 25 U.S.C. 161a, 161b, and 162a— invoked by resondents and the panel below in this case—do *not* furnish a basis for an award of interest on a claim for mismanagement of natural resources. *Mitchell* v. *United States*, 664 F.2d 265, 274-275 (Ct. Cl. 1981), aff'd on other grounds, 463 U.S. 206 (1983); see Pet. App. 30a-32a (Rader, J., dissenting in part). Thus, respondents' argument, like the Federal Circuit's decision in this case, is a sharp departure from established precedent barring the award of prejudgment interest.

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

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